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EXAMINER

WILEY, DANIEL J

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte XAVIER RAMON

Appeal 2015-000536
Application 13/632,464¹
Technology Center 3600

Before JILL D. HILL, THOMAS F. SMEGAL, and
JEFFREY A. STEPHENS, *Administrative Patent Judges*.

SMEGAL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Xavier Ramon (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection under 35 U.S.C. § 103(a) of claims 1–5, 7, and 9 as unpatentable over Bright (US 3,921,960, iss. Nov. 25, 1975) and Korchak (US 2,844,910, iss. July 29, 1958); of claim 6 as unpatentable over Bright, Korchak, and Atkinson (US 2009/0266574 A1, pub. Oct. 29, 2009); of claim 8 as unpatentable over Bright, Korchak, and Smith (US 2005/0121658 A1, June 9, 2005); and of claim 10 as unpatentable over

¹ According to Appellant, the real party in interest is BO PLAN BVBA. Appeal Br. 3.

Bright, Korchak, and Venegas (US 5,312,089, iss. May 17, 1994). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

CLAIMED SUBJECT MATTER

Claim 1, the sole independent claim, is reproduced below and illustrates the claimed subject matter, with disputed limitations emphasized.

1. A fence, comprising:
 - at least two hollow fence posts, between which at least two crossbeams extend;
 - wherein each crossbeam fits into an opening provided in one of the fence posts;
 - a plate-shaped blocking element extending into a cavity of one of the fence posts which is provided to block the crossbeams against displacement;
 - wherein the crossbeams are provided in their external circumference with at least one recess which lies within the hollow inner area of the fence post;
 - wherein the plate-shaped blocking element is movable between a first position in which the crossbeams are movable into and out of the fence posts and a second position in which the crossbeams are blocked in place;
 - wherein the aforementioned blocking element comprises at least two openings positioned at a distance from one another, which are each provided to block a crossbeam against displacement;
 - wherein the aforementioned blocking element is provided between the aforementioned blocking element openings with **one or more break lines**, along which the blocking element is breakable into different separate blocking elements.*

ANALYSIS

Obviousness of Claims 1–5, 7, and 9 over Bright and Korchak

We are persuaded by Appellant’s arguments that the Examiner fails to establish obviousness of claims 1–5, 7, and 9 over Bright and Korchak. *See* Appeal Br. 10–16; *see also* Reply Br. 1–5.

The Examiner contends that the disclosure of Bright and Korchak are combinable to render claim 1 obvious. *See* Final Act. 4–7; Ans. 2–7. While not disputing the teachings of Bright, Appellant argues, *inter alia*, that “*Korchak* is non-analogous art and cannot render the present invention obvious because it is neither in the field of [Appellant’s] endeavor, nor reasonably pertinent to the particular problem with which the [Appellant] was concerned.” Appeal Br. 11. Appellant points out that “*Korchak* relates to a frozen confection handle (i.e. popsicle stick) that can be used to fabricate toy structures” that are “not in the field of [Appellant’s] endeavor (fencing),” and concludes that “[n]o inventor would ever think to look to *Korchak* for solutions to fencing problems” because “*Korchak* deals with popsicle sticks.” *Id.* (citing *Korchak*, col. 1, ll. 15–18).

Our reviewing court has provided two criteria useful in finding whether art is non-analogous: “(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1351 (Fed. Cir. 2010) (quoting *In re Clay*, 966 F.2d 656, 658-59 (Fed. Cir. 1992)). *See also K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1375 (Fed. Cir. 2012) (citing

Innovation Toys, LLC v. MGA Entm't, Inc., 637 F.3d 1314, 1321 (Fed.Cir.2011)).

The Examiner considers Korchak to be reasonably pertinent to the problem faced by Appellant. *See* Ans. 2–5. However, Appellant correctly points out that “a reference not in the same field of endeavor as the claimed invention is analogous art only if it ‘is reasonably pertinent to the problem faced **by the inventor**. . . .’” and that “[w]hether *Korchak* is pertinent to the problems faced by *Bright* is irrelevant.” Reply Br. 1–2. We agree with Appellant that the problem faced by the inventor was “preserving the functionality of a fence after initial impact,” and that the Examiner does not challenge this statement of the problem or contend that Korchak is reasonably pertinent to this problem. *See Id.* at 3; *see* Specification, p. 3, ll. 11–19.

Based on the evidence before us, the Examiner has not demonstrated that Korchak is analogous art, and therefore has failed to establish that the claimed subject matter would have been obvious to one having ordinary skill in the art. Accordingly, we do not sustain the Examiner’s rejection of claims 1–5, 7, and 9 under 35 U.S.C. §103(a) as unpatentable over Bright and Korchak.

Obviousness of Claim 6 over Bright, Korchak, and Atkinson: of Claim 8 over Bright, Korchak, and Smith; and of Claim 10 over Bright, Korchak, and Venegas

Regarding the referenced claims, each of the Examiner’s rejections is based on the same unsupported findings discussed above with respect to the disclosure of Korchak. *See generally* Final Act. 9–13; Ans. 8–9. The

addition of Atkinson, Smith or Venegas does not remedy the deficiencies of Korchak, as discussed *supra*.

Accordingly, for similar reasons as discussed above for claim 1, we do not sustain the Examiner's decision rejecting claim 6 over Bright, Korchak, and Atkinson, claim 8 over Bright, Korchak, and Smith, and claim 10 over Bright, Korchak, and Venegas.

DECISION

The Examiner's prior art rejections are reversed.

REVERSED